DOES FREE SPEECH JURISPRUDENCE REST ON A MISTAKE?: IMPLICATIONS OF THE COMMENSURABILITY DEBATE

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I. INTRODUCTION

Determining whether a person is actually doing what they sincerely claim to be doing sometimes requires care in describing their activity. Consider the case of a reader of tea leaves. Even the skeptic can concede that the reader's purpose in examining the tea leaves is to ascertain the future. In this sense, the reader is actually "reading" the tea leaves. But in another sense the reader is laboring under what most of us take to be an error of logic or of fact, albeit in good faith. Future events of personal interest are only randomly related to the arrangement or pattern of selected tea leaves. One therefore cannot read tea leaves by systematically drawing connections between aspects of the tea leaves and significant future occurrences. No such systematic connections exist, and none is there to be "read."

What this Article shall refer to as the "commensurability[1] debate," a debate carried out with great vigor by a number of contemporary philosophers,[2] unfortunately arouses suspicion that judges, despite their good faith and best efforts, are in a position roughly analogous to that of the tea leaf readers when the judges apply common techniques for deciding free speech cases. The judges' error is subtler and more excusable than that of the tea leaf readers. While in one sense judges are doing what they purport to be doing, a fair conclusion is that in another more important sense they are not.

Typically, judges adjudicating free-speech cases purportedly engage

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1. Commensurability refers to the comparability of two things on a single, standard measurement scale. *See* Perry, *Some Notes on Absolutism, Consequentialism, and Incommensurability,* 79 NW. U.L. REV. 967, 979 (1985).

2. *See* J. RAZ, THE MORALITY OF FREEDOM 321-66 (1986); Griffin, *Are There Incommensurable Values?,* 7 PHIL. & PUB. AFF. 39, 44 (1977); Hallett, *The 'Incommensurability' of Values,* 28 HEYTHROP J. 373, 381 (1987); Perry, *supra* note 1, at 979; Regan, *Authority and Value: Reflections on Raz's* Morality of Freedom, 62 S. CAL. L. REV. 995, 1056 (1989); Van Bendegem, *Incommensurability—An Algorithmic Approach,* 32 PHILOSOPHICA 97 (1983).

in some form of weighing or balancing of conflicting interests.[3] This admittedly metaphorical technique is neither explicitly referred to in the Constitution generally nor in the first amendment's Free Speech Clause in particular.[4] Nevertheless, "the balancing of individual rights and public good [has been maintained to be] the essence of American constitutionalism."[5] With increasing frequency, the Supreme Court of the United States has adopted one form or another of balancing in free-speech cases.[6] This Article argues, however, that the Court cannot coherently balance state interests and the right of free speech, at least in any way authorized by the Constitution. This means that most free-speech balancing decisions are constitutionally illegitimate. However, for several reasons explored below, an "absolutist" interpretation of the Free Speech Clause is not the only remaining constitutional option for deciding free-speech cases.[7]

II. BALANCING IN FREE SPEECH CASES

The logic supporting balancing in free speech cases was set forth in Justice Felix Frankfurter's classic concurring opinion in *Niemotko v. Maryland*.[8] Justice Frankfurter referred to "the inevitable conflict between free speech"[9]—which he conceived of as an interest[10]—on the one hand, and various other important interests[11] on the other. He applied balancing in an attempt to reconcile the multiplicity of interests at stake.[12] While the balancing process is often described as involving opposing "interests," courts and commentators have also referred to

3. *See* Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1022-23 (1978).

4. *Id. See* U.S. CONST. amend. I. The first amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

5. *See* Henkin, *supra* note 3, at 1041.

6. *See* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 967 (1987).

7. "Absolutism" in this context refers simply to the idea that freedom of speech is indefeasible, or limitless in power within its scope. For background, see Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245 (1961).

8. 340 U.S. 268, 273 (1951) (Frankfurter, J., concurring).

9. *Id.* at 275 (Frankfurter, J., concurring).

10. *Id.* at 276 (Frankfurter, J., concurring).

11. *Id.* (Frankfurter, J., concurring) (other important interests include protection of public peace and of primary uses of streets and parks).

12. *Id.* at 282 (Frankfurter, J., concurring). Justice Frankfurter, after discussing a number of free speech cases, *id.* at 276-81 (Frankfurter, J., concurring) proposed several factors to be used to determine which was the "overbalancing consideration." *Id.* at 282 (Frankfurter, J., concurring). These factors were: "(1) What is the [state] interest deemed to require the regulation of speech? . . . (2) What is the method used to achieve such ends as a consequence of which public speech is constrained or barred? . . . (3) What mode of speech is regulated? . . . (4)

"needs,"[13] "harms,"[14] "values,"[15] or "rights,"[16] perhaps assuming that such concepts are essentially synonymous.[17] Occasionally, courts do not further classify free speech in any fashion, and instead presumes to simply weigh or measure "the 'invasion of free speech' "[18] as one element in the balancing process.[19]

Since then, the Supreme Court has developed a variety of balancing tests. Some of these tests are suited for different types of speech, others for restrictions on speech, still others for taking into account other relevant contextual differences.[20] In sum, and without placing too much stock in the precise phrasing, the law is that content-based restrictions on speech,[21] or at least on political speech,[22] must further a compelling state interest, and be narrowly tailored to the interest served.[23] Content-neu-

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Where does the speaking which is regulated take place?" *Id.* at 282-83 (Frankfurter, J., concurring).

13. *See, e.g.,* Galloway, *Means-End Scrutiny in American Constitutional Law,* 21 LOY. L.A.L. REV. 449, 461 (1988).

14. *Id.*

15. *See, e.g.,* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986).

16. *See, e.g.,* Marsh v. Alabama, 326 U.S. 501, 509 (1946); *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 191-92 (1977).

17. The Court apparently considered the concepts of interest, right, and need to be equivalent in United States v. Salerno, 481 U.S. 739, 750-51 (1987).

18. *See, e.g.,* Dennis v. United States, 341 U.S. 494, 510 (1951) (adopting Chief Judge Learned Hand's balancing formula used in majority decision of court below, "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

19. *Dennis,* 341 U.S. at 510; *see also* Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424, 1427-28 (1962). The Learned Hand free speech balancing formula is elaborated on in Posner, *Free Speech in an Economic Perspective,* 20 SUFFOLK U.L. REV. 1, 8-9 (1986), in which Judge Posner weighs the social losses and social costs associated with an invasion of free speech. *Id.*

20. *See infra* notes 21-29 and accompanying text.

21. Sable Communications v. FCC, 109 S. Ct. 2829, 2836 (1989). A restriction is content-based if *"on its face* a governmental action is targeted at ideas or information that government seeks to suppress, or if a governmental action neutral on its face was motivated by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 794 (2d ed. 1988) (footnotes omitted).

22. Eu v. San Francisco County Democratic Cent. Comm., 109 S. Ct. 1013, 1019-20 (1989) (challenged law burdening political rights can survive only if state proves law advances compelling state interest and is narrowly tailored); Boos v. Barry, 485 U.S. 312, 321 (1988) (statute prohibiting signs which disparage foreign governments within 500 feet of embassy deemed as unconstitutional, content-based restriction on political speech in public forum because not narrowly tailored).

23. *See, e.g., San Francisco County Democratic Cent. Comm.,* 109 S. Ct. at 1019-20; *Sable Communications,* 109 S. Ct. at 2836; *Boos,* 485 U.S. at 321. "Narrowly tailored" governmental regulations of free speech must generally be designed to avoid restricting speech that does not interfere with the governmental interest. *See Sable Communications,* 109 S. Ct. at 2836.

tral time, place, and manner restrictions,[24] even in a public forum,[25] may be justified if they are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[26] At the same time, regulations of activity involving a mixture of speech and conduct must, among other requirements, further an important or substantial state interest.[27] Restrictions on commercial speech must also be narrowly tailored to the governmental interest served and must directly and with some degree of effectiveness promote a "substantial" governmental interest.[28] Finally, in the area of public-employee speech, the Court has held that the constitutionality of discharging a public employee for speech depends upon " 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "[29]

These formulae illustrate the balancing tests commonly employed by the Court in typical free-speech cases. Each of these balancing tests may be comprised of one or more subordinate balancing tests. Whether an interest qualifies as "compelling," for example, may itself be a determination requiring some balancing.[30] Even whether a particular regulation is "narrowly tailored" to effect an interest may also inescapably

24. Content-neutral time, place, and manner restrictions are governmental restrictions on speech as to when, where and how it can be made, unrelated to the content or message of the regulated speech. *See, e.g.,* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989).

25. A "public forum" is a place, such as a street or public park, which is by tradition or government fiat the site of public discussion and advocacy. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (refusing to classify teachers' workplace mailboxes as public forum because unavailable for use by general public).

26. *Rock Against Racism*, 109 S. Ct. at 2753 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Compare this requirement that government interests be significant with Buckley v. Valeo, 424 U.S. 1, 18 (1976) which summarizes time, place and manner restrictions as requiring that governmental interests be "important." The per curiam opinion in *Buckley* also used the more purely evaluative, normative terms of a "sufficiently important" interest. *Id.* at 25.

27. *See, e.g.,* United States v. O'Brien, 391 U.S. 367, 377 (1968) (law prohibiting destruction of draft-cards upheld as furthering an important or substantial governmental interest); Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1548 (7th Cir. 1989), *cert. denied,* 110 S. Ct. 839 (1990) (challenge to municipal regulation of cable broadcasting).

28. *See, e.g.,* Board of Trustees v. Fox, 109 S. Ct. 3028, 3032 (1989) (regulation of kitchenware demonstrations and sales in college dormitories); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980) (regulation banning electric utility from advertising to promote use).

29. Rankin v. McPherson, 483 U.S. 378, 384 (1987) (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)) (brackets in *Rankin*).

30. *See infra* text accompanying note 154.

involve value balancing.[31]

As the formulae suggest, the balancing process is often focused on one or more of the "interests" that might be involved in a case, and particularly on those interests invoked by the government in supporting the restriction on freedom of speech. Again, placing too much stock in the Court's precise terminological choices is unwise; the cases lack uniformity even under particular tests.[32]

More importantly, ambiguity continues as to whether the interest in question is characterized in only minimally comparative terms, e.g., a "substantial" interest, or in more clearly comparative, more directly normative terms,[33] e.g., an interest "sufficiently substantial" to justify an incursion into the rights or interests of the speaker.[34] This ambiguity particularly haunts the notion of a "compelling" state interest. The courts have simply never clarified whether a compelling interest is: (1) a particular kind of interest, presumably of a high order, such as national security; or (2) an essentially circumstantial and normative, more purely comparative conception, encompassing by definition any jurisprudentially recognized state interest which is sufficiently strong as to justify an impingement upon free-speech rights or interests.[35]

Among state interests found to be compelling, or perhaps sufficiently compelling under the circumstances in light of the costs to freedom of speech, are the interests in preserving the integrity of the election process,[36] maintaining the stability of a state's political system,[37] protecting the judicial system from undue political influence,[38] ensuring public officers' faithful exercise of their official obligations,[39] and shielding minors from pornographic literature or telephone messages not obscene by adult standards.[40]

However, in some cases in which the Supreme Court and lower

31. *See, e.g., Sable Communications,* 109 S. Ct. at 2839-40 (Scalia, J., concurring). Justice Scalia recognized in *Sable* that the courts often intuitively trade off degrees of furthering the restrictive statute's purpose against the degree of precision in narrowness of tailoring of the restriction to the purpose. *Id.* (Scalia, J., concurring)

32. *See infra* notes 36-40 & 153-57 and accompanying text.

33. This Article uses the phrase "normative term" to describe a phrase such as "sufficiently substantial" which implicitly suggests an outcome and, therefore, actually creates a rule of law.

34. *See infra* notes 154-55 and accompanying text.

35. *See infra* notes 154-55 and accompanying text.

36. *See San Francisco County Democratic Cent. Comm.*, 109 S. Ct. at 1024.

37. *See id.* at 1022.

38. *See* Geary v. Renne, 880 F.2d 1062, 1072 (9th Cir. 1989).

39. *Id.* at 1071.

40. *See Sable Communications*, 109 S. Ct. at 2836.

courts might have been expected to refer to "compelling" state interests, the Court has instead referred to "important," "overriding," or "strong" interests.[41] For example, the national interest in fostering and maintaining international relations has been referred to as "important,"[42] and the interest in preventing statements by law enforcement employees promoting serious, violent crime has been referred to as "strong."[43] The equivalence of "compelling" with "important" or "strong" state interests is questionable and highlights the lack of clarity as to how evaluative and comparative[44] is the concept of a "compelling state interest." The more purely evaluative the concept of "compelling" becomes, the less informative and the less useful it becomes as a component of a balancing test.

Lesser interests, relevant in connection with presumably less demanding types of balancing tests, include interests of substantial importance,[45] substantial interests,[46] and significant interests.[47] Courts have, for example, identified community aesthetics as an interest of "substantial importance."[48] Privacy within one's home, prevention of crime, and consumer protection have been recognized as among the range of substantial state interests.[49] In addition, the interest in promoting an educational, as opposed to commercial, atmosphere on college campuses,[50] the

41. *See infra* notes 42-43 and accompanying text. See also *Bowen v. Roy*, 476 U.S. 693 (1986), a free exercise of religion case, in which Chief Justice Burger referred to the "important" interest in preventing fraud in Social Security benefit programs. *Id.* at 709. Justice O'Connor wrote in terms of the lack of "overriding weight" of the government interest in administrative efficiency, apparently treating interests of overriding weight as synonymous with "compelling" interests. *Id.* at 730 (O'Connor, J., concurring in part and dissenting in part).

42. *Boos*, 485 U.S. at 321.

43. *See Rankin*, 483 U.S. at 399 (Scalia, J., dissenting) (discharge of county employee for remark expressing hope that next presidential assassination attempt is successful held to violate employee's first amendment rights).

44. The problem may be stated as whether the term "compelling" state interest refers merely to the result of the balancing process, or refers instead to a classification that is a part of the actual balancing process itself.

45. *See infra* note 48 and accompanying text.

46. *See infra* notes 49-52 and accompanying text.

47. *See infra* note 54 and accompanying text.

48. *See, e.g.*, Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (government interests in community aesthetics held to be substantial or important); Ackerley Communications v. City of Sommerville, 878 F.2d 513, 521 (1st Cir. 1989) (government interest in city aesthetics held to be of substantial importance).

49. *See, e.g.*, Project 80's, Inc. v. City of Pocatello, 876 F.2d 711, 714 (9th Cir. 1988), *cert. granted and judgment vacated sub nom.* Idaho Falls v. Project 80's Inc., 110 S. Ct. 709 (1989) (government has substantial interest in consumer protection, protecting citizens' privacy and prevention of crime).

50. Board of Trustees v. Fox, 109 S. Ct. 3028, 3032 (1989).

interest in promoting safety,[51] and in protecting citizens from unwanted noise[52] have also been held to be substantial state interests. Among the interests deemed to qualify as both important and substantial, in the context of cable television programming, are the promotion of "localism," community pride, cultural diversity, and the provision of jobs and internships for residents of one locality rather than another.[53] The free movement of traffic on the public streets and associated traffic-safety interests have qualified as "significant."[54] Despite the variety of terms employed, it is difficult to believe that the courts have systematically adhered to any scheme in which real differences between and among substantial, important, and significant interests are recognized and observed.

Although the identification and categorization by the courts of these undoubtedly overlapping interests leave a train of unresolved questions,[55] balancing in many free speech contexts may remain attractive, especially to those who emphasize value pluralism and relativism. As Louis Henkin has observed, "Balancing is highly appealing. It provides bridges between the abstractions of principle and the life of facts. It bespeaks moderation and reasonableness, the Golden Mean. It refines the process of judicial review. It softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree."[56] Balancing in freedom-of-speech cases is, however, constitutionally and logically problematic.

III. THE GENERAL PROBLEM OF VALUE COMMENSURABILITY

A. The Possibility of Commensurability

Each of the free speech balancing tests referred to above, however formulated, logically requires a court to perform a comparison, however intuitive, subjective or vaguely described that comparison may be, and regardless of what is being compared. For example, when a government employee is dismissed for allegedly speaking on an issue of public concern, the court must compare the relative weights of the relevant interests, or at least some of the relevant interests, pulling the result in either

51. *Id.*

52. *Rock Against Racism*, 109 S. Ct. at 2756.

53. *Chicago Cable Communications*, 879 F.2d at 1549-50.

54. *E.g.*, International Soc'y for Krishna Consciousness v. City of Baton Rouge, 876 F.2d 494, 498, 500 (5th Cir. 1989) (government has significant interest in regulating traffic flow and promoting roadway safety).

55. The unresolved questions might include questions such as: Are compelling interests the same as "strong" interests? On what grounds does a court evaluate a legitimate statutory interest to determine whether the interest is "strong," "weak" or in between?

56. Henkin, *supra* note 3, at 1047.

direction.[57] This kind of relative weighing necessarily involves at least some minimal commensurability, or common ground for comparison, between or among the interests to be weighed.

In the course of discussing the issue of the commensurability of scientific theories, Professor Van Bendegem, a philosopher of science, has provided what he referred to as an algorithm of commensurability.[58] Under this approach, commensurability requires that a person be able to "(1) identify the things to be compared (2) decide on a set of criteria on which the comparison will be based (3) execute the comparison [and] (4) reduce [the criteria into] a single scale."[59] Commensurability, and hence any comparison requiring commensurability, collapses if any one of the four stages fails.[60]

Van Bendegem's understanding of commensurability seems to parallel that offered by Professor Michael Perry in his discussion of commensurability of values.[61] Under Perry's approach, "two things are commensurable if there is a standard of comparison—if the two things can be put on the same scale, if they can be measured against, compared to, one another in terms of the same standard."[62] Alternatively, commensurability may be thought of along the lines suggested by Professor Donald Regan,[63] who proposes that:

> Two valuable things are incommensurable with respect to their value if (a) neither is more valuable than the other, and (b) they are not of equal value. If neither is more valuable than the other, and if their values are also not equal, then clearly their values are incomparable. They do not appear on any common scale of ordering.[64]

For this Article's purposes, any of these conceptions of the nature of commensurability will suffice.

The problem then becomes one of determining whether the judicial process is a legitimate mechanism for resolving apparently conflicting, incompatible values in a free-speech context. Often, there cannot be both maximum freedom of speech and maximum fulfillment of some signifi-

57. Rankin v. McPherson, 483 U.S. 378, 384 (1987). *See also supra* text accompanying note 29.

58. Van Bendegem, *supra* note 2, at 97.

59. *Id.* at 98.

60. *Id.*

61. Perry, *supra* note 1, at 979.

62. *Id.*

63. Regan, *supra* note 2, at 1056.

64. *Id.* For a similar approach, see J. RAZ, *supra* note 2, at 332 (incommensurability as flowing from being neither better, nor worse, nor of equal value).

cant, substantial, important, or compelling state interest. The typical judicial resolution seems to involve comparative weighing of values in some respect, but one must ask whether the values weighed are actually commensurable in a constitutionally legitimate way.

For several reasons, the legitimacy of any theory of commensurability could be questioned. Many instances of free-speech balancing seem dauntingly difficult, as do many instances of value balancing in general.[65] Weighing an intrusion on freedom of speech against the possible attainment of some sort of incompatible public good can often lead to conclusory or arbitrary judicial decisions.[66] Examining a judicial opinion in an attempt to determine why, precisely, one interest was held to outweigh another is often disappointing.[67] Further, the correctness of the outcome of free-speech-balancing cases cannot, any more than in the case of value comparisons generally,[68] be proven. Professor Hallett has framed the issue in a striking fashion: "Suppose someone questions whether the beatific vision is better than a box of chocolates. What answer can be given him? No value considerations one might cite in support of this judgment will seem any surer than the judgment that is questioned."[69]

Of course, a thing that is difficult to do is not in principle impossible. Even if value balancing has no demonstrably correct outcome, that would not place value balancing in any more jeopardy than mainstream ethical theory in general.[70] These objections to the claim that values are somehow commensurable in the context of free-speech adjudication are not necessarily fatal to the validity of free-speech adjudication.

Naturally, however, one would demand an answer to the question of the nature of the common scale or common standard against which the values, of whatever sort, on both sides of a free-speech case, are measured. The desired answer need not imply the ability to perform cardinal measurements.[71] Indeed, a defender of value commensurability need not

65. *See* Hallett, *supra* note 2, at 381. For an attempt by Professor Hallett to apply rudimentary quantitative techniques to a complex practical instance of value balancing in the realm of public affairs, see G. HALLETT, REASON AND RIGHT 185-86 (1984).

66. *See infra* notes 153-57 and accompanying text.

67. *See, e.g., Rankin,* 483 U.S. at 384 (free speech interest of constable office employee in wishing for assassination of President as outweighing interests of employer in office loyalty, morale, and integrity).

68. *See* Hallett, *supra* note 2, at 383.

69. *Id.*

70. *See, e.g.,* J. MACKIE, ETHICS (1977) (ethical principles ultimately matter of subjective choice or preference).

71. *See* Hallett, *supra* note 2, at 375.

point to any particular system of measurement units,[72] or a scale in any rigorous sense, as long as some method, however intuitive, of ascertaining which side of the judicial balance is heavier, and which side is lighter, can be described.

Any number of candidates for the commensurating unit may, in certain situations, suffice. Professor Perry is quite right, in a sense, when he observes that "I cannot think of any two things that are not commensurable—that cannot be compared in terms of the same standard. Think of any two things . . . and then consider this standard: which of the two things you would prefer to talk about right now."[73] Of course, this commensuration may not differentially value the two things in any socially interesting way, but preference for discussion is not the only method of value commensuration available. A person, including a judge, might instead choose between two incompatible alternatives on the basis of mere general preference, or on the basis of one outcome's promising greater overall satisfaction of desires, for either the chooser[74] or for society as a whole.[75]

Professor Hallett has suggested that the common denominator or single scale we are searching for is nothing other than the idea of "value" itself.[76] This view may do no more than once again raise the question of whether there is greater and lesser value, *simpliciter*, as opposed to particular kinds of values which may themselves take on different qualities and magnitudes. It may be impossible to maximize "value" overall in some generic sense.[77] It may even be doubtful as to whether it is coherent to aim at maximizing the less abstract quality of "overall satisfaction." Whether one particular social choice can be said to maximize overall societal satisfaction, or utility, is notoriously controversial.[78]

However, incommensurability of values is plausible only up to a certain point. It is difficult to assert that there is no meaning to the question of whether it is preferable under ordinary circumstances to not be distracted from one's recreational coffee drinking in order to rescue one's

72. *Id.*

73. Perry, *supra* note 1, at 980.

74. *See* Griffin, *supra* note 2, at 44.

75. *See id.* at 48.

76. Hallett, *supra* note 2, at 376.

77. For a brief summary of Professor Hallett's approach in this regard, see G. HALLETT, CHRISTIAN MORAL REASONING: AN ANALYTIC GUIDE 71-72 (1983).

78. Mill's views on the possibility of the interpersonal comparison of utility are expressed in his essays. *See* J.S. MILL, UTILITARIANISM WITH CRITICAL ESSAYS (S. Gorovitz ed. 1971). *See also* R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 261-65 (1979); Griffin, *supra* note 2, at 50-51.

friend from a painful accidental death.[79] At least some intuitive sense leads us to meaningfully assert or deny that person X is better at one activity than another, or even that person X is better at activity A than person Y is at activity B.[80] Commensurability of values, in a constitutional or other context, is not shown to be illegitimate, therefore, by merely pointing out that judges in free speech cases are seeking to compare "apples and oranges."[81] An apple may be heavier, for example, than an orange, or more immediately, preferred.

B. Limitations on Commensurability

Despite occasional broad assertions to the contrary,[82] disparate values do seem commensurable in at least some sense. Saving a life does seem to somehow outweigh undisturbed coffee drinking. Yet the claim that values are or may be incommensurable has some validity. Experience seems to reflect instances in which neither of two opposing sides in a legal case could be said to pose stronger arguments than the other, yet in our minds the two sides are not closely balanced either.[83] For example, people commonly deny the value comparability of alternative career paths, or of alternative types of recreation.[84] A person may profess to strongly prefer choice A to choice B, yet may be indifferent as between a combination of choice A and choice C or a combination of choice B and choice C.[85]

With respect to the use of pleasure or happiness as commensurating standards, Professor Alasdair MacIntyre points out that the different kinds of pleasures make different recreational choices more than just two different paths to the same end.[86] MacIntyre concludes that:

> The happiness which belongs peculiarly to the way of life of the cloister is not the same happiness as that which belongs peculiarly to the military life. For different pleasures and different happinesses are to a large degree incommensurable: there are

79. Pannier, *Finnis and the Commensurability of Goods,* 61 NEW SCHOLASTICISM 440, 443 (1987).

80. *See* Brown, *Incommensurability,* 26 INQUIRY 3, 21 (1983).

81. Aleinikoff, *supra* note 6, at 972.

82. *See, e.g.,* George, *Human Flourishing as a Criterion of Morality: A Critique of Perry's Naturalism,* 63 TUL. L. REV. 1455, 1456 (1989) (introducing incommensurability-defense theory of John Finnis); Tushnet, *An Essay on Rights,* 62 TEX. L. REV. 1363, 1372 (1984) (recounting familiar critical assertion that interests cannot be balanced because it is impossible to reduce them to some common measure of value).

83. *See* Mackie, *The Third Theory of Law,* 7 PHIL. & PUB. AFF. 3, 9 (1977).

84. *See* J. RAZ, *supra* note 2, at 336.

85. *Id.* at 328.

86. A. MACINTYRE, AFTER VIRTUE 63-64 (2d ed. 1984).

> no scales of quality or quantity on which to weigh them. Consequently appeal to the criteria of pleasure will not tell me whether to drink or swim and appeal to those [criteria] of happiness cannot decide for me between the life of the monk and that of a soldier.[87]

MacIntyre's point is well-taken whether in or out of a legal context. The beginning of a proper reconciliation of proponents and opponents of value commensurability may lie in this: in cases in which weighing or balancing of values leads to an ultimately justifiable choice or result, such a result is possible only because we subscribe to or have adopted other more basic rules or principles which authorize or make legitimate the particular weighing or balancing in which we engage. Thus, the value choice of chocolate over vanilla is not irrational or otherwise illegitimate, if one adopts an underlying norm that legitimizes choice on the basis of sheer gustatory preference, in which the taste of chocolate and vanilla are "weighed" by the chooser in this limited fashion. A predetermined objective, for example, may inform the value comparison.[88] This sort of predetermined objective is adopted independently of, and antecedent to, the value weighing or balancing that it may or may not happen to legitimize.[89] Therefore, it has rightly been observed that given the "objective of having an after-dinner drink, the act of drinking a cup of coffee is a better choice than the act of being a true friend."[90]

Significant for our purposes, though, is that the more basic role or principle that may authorize or perhaps drain the legitimacy from a particular sort of weighing or balancing may be not merely an ad hoc antecedent personal choice, but a larger group tradition or convention.[91] The importance of this connection is to recognize that a society's basic commitments, binding wherever applicable, may in part be expressed through its law.[92] A judge might want to weigh or balance the "interests" thought to be most crucially at stake in the case. The judge might want to commensurate those interests, or strike the balance in order to, for example, further the public interest, maximize utility, minimize suffering, or even maximally promote his or her own personal preferences. Judges

87. *Id.* at 64.

88. *See* J. FINNIS, NATURAL LAW AND NATURAL RIGHT 117 (1980).

89. *See id.* at 115.

90. Pannier, *supra* note 79, at 449.

91. *See* J. FINNIS, *supra* note 88, at 117-18.

92. Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 58 (1978) (arguing that moral judgments about right and wrong can be correct or mistaken).

are, however, sworn to uphold the Constitution.[93] It is entirely possible that the Constitution, as a set of independent antecedent basic principles and decision rules, may not authorize courts, at least in certain cases, to commensurate the values at stake in the ways that may happen to be preferred by the judge. In such cases, the court may in some limited sense have commensurated values if it uses decision-making techniques not authorized by the Constitution. But if the Constitution prohibits or limits weighing or balancing in that kind of case, or fails to authorize the judge's choice of the particular common scale or standard, then the judge's commensuration of values is constitutionally illegitimate.

Constitutional provisions plainly differ as to the degree and nature of any interest balancing they permit. The seventh amendment, for example, provides for a right to a jury trial of common law suits involving a sum in excess of twenty dollars.[94] If the necessary prerequisites are met, no general judicial balancing is authorized. There is no exception for cases in which a jury trial would involve a waste of resources, or fail a cost-benefit test, or disserve legitimate, significant, or substantial governmental interests.[95] In contrast, the eighth amendment prohibits excessive bail or excessive fines.[96] While in a limited sense this language is a flat prohibition, more crucially, the very idea of "excessiveness" invites, and in fact requires, some sort of inquiry in which opposing interests are weighed and balanced, with the bail or fine as a result deemed excessive or not.[97] Balancing is also authorized and unavoidable in determining whether the process accorded a private party by the government was the process that was "due" under the fifth or fourteenth amendment.[98]

In this respect, the Free Speech Clause is more like the seventh than the eighth amendment, in that it flatly and unqualifiedly enjoins respect for freedom of speech, however conceived, without reference to broad interest balancing.[99] Subordination of free speech rights to general public interests is a conceptually unsound judicial invention.[100] Freedom of speech, as a fundamental constitutional right, is by definition not susceptible of being set aside merely on the basis of some marginally more at-

93. Marbury v. Madison, 5 U.S. (1 Cranch) 49, 70-71 (1803) (Constitution directs "the judges to take an oath to support it").

94. U.S. CONST. amend. VII.

95. *See id.*

96. U.S. CONST. amend. VIII.

97. *See* United States v. Salerno, 481 U.S. 739, 750-51 (1987) (explicitly balancing arrestee's and public's interests in pretrial detention context).

98. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (explicitly balancing individual claimant's and governmental interests at stake in disability benefit termination hearing).

99. U.S. CONST. amend I. *See also supra* note 4 and accompanying text.

100. *See infra* notes 148-49 and accompanying text.

tractive incompatible ordinary public interest.[101] Neither the text of the Free Speech Clause, nor its underlying logic, authorizes suppression of free speech merely because it may be in the public interest, in some general sense, to do so on a particular occasion.[102]

IV. COMMENSURATION OF RIGHTS AND INTERESTS AS A CONSTITUTIONAL PROBLEM

In areas of individual constitutional rights, whether in regard to freedom of speech or other constitutional rights, the Supreme Court talks in terms of balancing interests against interests[103] at least as often as it talks of balancing constitutional rights, as rights, against opposing interests.[104] One possible explanation for this tendency is that speaking exclusively in terms of opposing interests, rather than rights and interests, seems, at least superficially, to reduce commensurability problems. For example, a governmental or public interest might be weighed against a private actor's "interest" with less controversy than it could be weighed against a private actor's constitutional right, especially where the text of the Constitution does not appear to authorize the regular, systematic balancing away of the right in question. Other, possibly deeper justifications exist for the Court's frequent reference to "interests" in constitutional balancing cases.[105] But to evaluate those possible justifications, the nature of interests, the nature of rights, and the murky relationship between the two must be briefly explored.

To understand the nature of interests[106] one must recognize that the concept of an interest, in the sense of what it may be in a person's interest

101. *See infra* note 145 and accompanying text.

102. *See infra* notes 143-45 and accompanying text.

103. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 384 (1987). For an example of an explicit balancing of interests in a constitutional context more conducive to balancing, that of the unavoidable inquiry into the reasonableness of the search or seizure under the fourth amendment, see *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (" 'We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' ") (quoting United States v. Place, 462 U.S. 696, 703 (1983)). Although the *Garner* Court balanced in "[t]he suspect's fundamental interest in his own life," *id.* at 9, it offered no indication of what a "fundamental interest," as opposed to a fundamental right, was, nor did it grant any special constitutional status to interests qualifying as "fundamental."

104. Marsh v. Alabama, 326 U.S. 501, 509 (1946) (ruling that first amendment rights are "preferred" over property rights).

105. The terminology of "interests," as opposed to "rights," would seem to maximize judicial flexibility, and any judicial preference for moral relativism is presumably better served by an "interests," as opposed to a "rights," vocabulary.

106. For a sensible, extended treatment of the concept of interests, see V. HELD, THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS (1970).

to do, has at least some normative or evaluative content. Not everything we may want or prefer is actually in our interest.[107] For example, people may have an interest in retaining their own good health even if they fail to recognize this interest or fail to promote their own good health.[108]

One writer has denied that interests in and of themselves have prescriptive force.[109] Another writer has argued more specifically the observation that "nothing compels one to say that '*A* ought to do *X*' is part of the meaning of, '*X* is in *A*'s interests.' "[110] In contrast, another writer has concluded that the concept of interest does have prescriptive force.[111] This dispute begins to illuminate the relationship between rights and interests. Suppose that person *B* is trying to convince person *A* to do *X*. Telling A that doing *X* would be in *A*'s own interest has potential cogency. Whether we call this prescriptive force or merely acknowledge it as providing a reason for *A* to do *X* is not crucial. The potential cogency vanishes, though, when we substitute the concept of having a right for the concept of having an interest. Pointing out that *A* has a moral or legal right to do *X* does not normally amount to a reason for *A* to do *X*. *A*'s knowing of a right to do *X* may legitimize *A* doing *X*, but it does not normally begin to suggest why *A* should exercise that right. For example, that *A* has a right to evict *C* does not by itself suggest that *A* should evict *C*. That *A* has an interest to evict *C* at least gives *A* some initial reason to do so.

A person's interests, therefore, seem to lead to particular, determinate choices by that person more clearly than do that person's rights. This difference may be related to another difference between rights and interests. Statements of what is in *A*'s interest to do can be complete and coherent without any essential reference to other people.[112] Consider the case of an isolated individual on a desert island. It can be in Robinson Crusoe's interest in survival[113] to stay out of the rain. In contrast, statements of what a person has a moral or legal right to do seem to function roughly to put up a barrier against interference by other people with that person or with that person's actions. Statements of what *A* has a right to do tell us primarily about what one or more persons other than *A* are allowed to do. Thus, there is no cogency to the assertion that a person

107. *See* M. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 20 (1988).
108. *Id.*
109. *Id.*
110. Frey, *Interests and Animal Rights,* 27 PHIL. Q. 254, 255 (1977).
111. McCloskey, *Rights,* 15 PHIL. Q. 115, 126 (1965).
112. *See* Frey, *supra* note 110, at 258.
113. *See* M. PERRY, *supra* note 107.

should do *X* because that person has a right to do *X*.[114]

While interests seem to have more inherent motivating cogency than rights, the concept of rights seems more directly relevant to what we ordinarily expect judges to do, that is, to raise or lower barriers to action between persons. *A* person or a society may be motivated to do *X* because it is in that person's or society's interests to do so. At the same time, however, close to the essence of constitutional law is the duty of judges to restrain, in proper cases, the pursuit of individual or collective interests by means of barriers such as constitutional rights.[115]

Rights have been conceived of in various ways.[116] Some of the most important rights in the constitutional context have a character Professor Joel Feinberg refers to as "discretionary."[117] This term refers to the bivalent or multivalent character of the right in question.[118] The constitutional right to speak, for example, actually amounts to a right to speak or not to speak, as one prefers.[119] The legitimate exercise of the right of free speech may, as a discretionary right, take the form of not speaking, or of performing what is in a sense "no action at all."[120] In this respect, rights obviously differ from interests. If doing something is in a person's interest, and not merely within the scope of the person's rights, then ordinarily it will not be in that person's interest to fail to do the thing in question. For example, if it is in a person's interest to have a balanced diet, it is presumably not in that person's interest to have an unbalanced diet or to fail to eat at all.

This difference between rights and interests is related to the fact that "we may have rights to do what it is not in our interest to do."[121] In fact,

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114. Having a right to do *X* usually implies a concomitant right to not do *X*. Part of the right to vote, or to speak, for example, is the right to abstain, or to hold one's silence. When we tell a person that he or she has a right to speak, we are really telling him or her that he or she has a right to speak or not speak. Wooley v. Maynard, 430 U.S. 705, 714 (1977); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943). That one *may* act in a certain determinate way, or not, does not by itself provide much incentive to actually act in that way.

115. The suggestion is not that only constitutional rights can restrain the pursuit of interests; a person may have a duty or obligation to not pursue her interests beyond a certain point. The concept of having a right is a much more recent historical development than that of having a duty. *See* A. WHITE, RIGHTS 21 (1984).

116. *See generally* J. FEINBERG, SOCIAL PHILOSOPHY ch. 5 (1973) (providing typology of moral and legal rights); A. WHITE, *supra* note 115, at 13-19 (providing typology of moral and legal rights); McCloskey, *supra* note 111, at 119-20 (focusing on types of moral rights).

117. *See* J. FEINBERG, *supra* note 116, at 69-70.

118. *Id.*

119. *Wooley,* 430 U.S. at 714; *Barnette,* 319 U.S. at 634.

120. *See* J. FEINBERG, *supra* note 116, at 70 (emphasis omitted).

121. V. HELD, RIGHTS AND GOODS 20 (1984).

a person may have a right to do something that is in no one's interest. A person may have a legal right to bequeath a carton of cigarettes. As another example, a foolish racial slur may simultaneously be protected under current law[122] and yet be a net disservice to the interests of all directly affected parties. Conversely, one may have a genuine interest in doing, or in being able to do, many things that are beyond the scope of one's rights. Rights by their very nature are entitlements,[123] whereas interests are not.

Noting these basic differences between rights and interests makes it implausible to conclude that, for constitutional purposes, rights are equivalent[124] to interests, "on a par"[125] with interests, or that "there is no warrant for different categorical treatment of rights [and] interests."[126] Taking rights seriously, in the sense of not holding rights continually hostage to ordinary interest calculations, requires recognizing the differences between the concepts of rights and of interests.[127]

While undoubtedly some relationship exists between rights and interests, the relationship is unclear in certain respects. Possibly, only persons who have interests can have any kind of rights.[128] Perhaps "rights and interests share a common source" in the Constitution[129] and are found in our nature as rational, sentient, or created beings. A quite plausible if ultimately misleading argument has been that rights issue from the interests of the right-holder.[130]

At least some rights may be recognized only because of certain antecedent purposes, or interests, that society wishes to fulfill.[131] Rights may

122. *See, e.g.*, Dawson v. Zayre Dep't Stores, 346 Pa. Super. 357, 359, 499 A.2d 648, 649 (1985) (store employee not liable for intentional infliction of emotional distress for using racial epithet in dispute with customer).

123. *See* McCloskey, *supra* note 111, at 118. *See also* the controversial discussion of rights in R. NOZICK, ANARCHY, STATE, AND UTOPIA 149-60 (1974).

124. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication,* 68 B.U.L. REV. 917, 920 (1988).

125. *Id.*

126. *Id.* at 969.

127. *See* I. SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 273-74 (1986) (discussing historical relation between rights and interests in Anglo-American liberal tradition of political theory).

128. *See* Regan, *Frey on Interests and Animal Rights,* 27 PHIL. Q. 335, 335 (1977) (assuming, rather than arguing, that only persons with interests have moral rights).

129. *See* Gottlieb, *supra* note 124, at 974.

130. *See* J. THOMSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 60 (1986). This argument is somewhat misleading because a right-holder's interest can only show that the right-holder would benefit from having rights but the benefit does not, on its own, create any right.

131. *See* A. GEWIRTH, REASON AND MORALITY 48 (1978).

typically function to protect interests.[132] It may even be reasonable to turn to a vague balancing of interests when we must adjudicate or choose between inherently conflicting rights which enjoy the same status.[133] Premises such as these may suggest that the actions of government,[134] or the Constitution itself,[135] should be evaluated in terms of interest satisfaction. While this conclusion is in a sense unobjectionable, it will lead to dangerous results if it suggests that interests and rights of every kind are commensurate.

Professor Joseph Raz implicitly warns of this danger when he asserts that "[g]iven that rights are based on people's interests it cannot be claimed that [rights] are trumps in the sense of overriding other considerations based on individual interests."[136] But the statement that if *A* arises from *B*, or has a source in common with *B*, it can rise no higher in status than *B* is a fallacy. Consider, for example, the issue of whether a person should be held in slavery or not. For the sake of argument, concede that moral or legal rules against slavery are somehow based on individual interests or on the public interest. However, focusing merely on the slaves' best interests or some collective interest is not the most logically or conceptually powerful argument available against slavery. For example, to stake the entire case against slavery in terms of some aggregation of interests would be peculiar. Independent reference to the concept of a right not to be a slave seems not merely to rephrase the argument, but to add something to its cogency.

Despite the fact that rights may be based on or share a source with interests, rights should not be reduced to and equated with interests. The example of slavery suggests that the right to not be enslaved may not be overridden by pointing to any mere combination of interests, including those of the slave. One might loosely express this by saying that the right not to be enslaved always "outweighs" whatever interests may be arrayed in favor of enslavement. A better approach would be to say that the right to not be enslaved, by virtue of being a strong, fundamental or even absolute right, cannot be outweighed by placing it on a common scale with a set of ordinary interests; in other words, the right and the interests are not commensurable.[137] No common scale can legitimately, in a morally

132. J. RAZ, *supra* note 2, at 178-79.

133. J. FEINBERG, *supra* note 116, at 72-73.

134. *See* V. HELD, *supra* note 121, at 149.

135. *See* I. SHAPIRO, *supra* note 127, at 278-79.

136. J. RAZ, *supra* note 2, at 187.

137. This absolutist formulation will serve for most practical purposes, but conceivably there may be some morally catastrophic set of circumstances in which, for example, the temporary enslavement of a truly randomly selected, ultimately compensated person under agreeable

authorized way,[138] commensurate the right to not be enslaved against a set of conflicting interests, such that the "balance" perhaps tips one way and then the other.

No matter what the particular situation involves, the conclusion as to the non-existence of a common scale rests partly upon the nature of rights in general, and partly upon the character of the particular right in question. Frequently, rights are "introduced to guard, legally or morally, the corresponding freedom."[139] Presumably, the point of characterizing freedom of speech as a right is to distinctively protect freedom of speech. For example, characterizing the freedom to criticize public officials as a fundamental[140] "right"[141] disallows broad interest-balancing.[142] Protecting freedom of speech by means of assigning it the status of a right supposedly will, over the run of judicial decisions, be in the interests of most or all persons. But giving freedom of speech the status of a fundamental constitutional right means either that we distrust our ability to efficiently evaluate the relevant interests in particular free-speech cases, or that freedom of speech, as a right, should not be subject to restriction in particular cases even when the restriction could be seen as being in the public interest. As a general rule, "rights take priority over interests, even general interests,"[143] or the interests of the community as a whole.[144]

> Professor Ronald Dworkin makes this point in the following terms:
>
> Suppose, for example, some man says he recognizes the right of free speech, but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of collective welfare, and

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conditions might be thought morally justified. See *infra* notes 162-70 and accompanying text for a discussion of the corresponding "extreme" cases in the constitutional context of freedom of speech.

138. Any person, including a judge, might "commensurate" the two conflicting alternatives in the slavery case—slavery versus abolition—by asking, for example, which state of affairs would be popularly preferred, but a safe assumption is that this commensurating technique is not authorized by the Constitution. *See supra* text accompanying notes 92-102. The point of constitutionalizing any alternative is, at a minimum, to give it a special and a supra-majoritarian status. *See* Grey, *Constitutionalism: An Analytic Framework,* in 20 NOMOS: CONSTITUTIONALISM 189, 194-95 (J. Pennock & J. Chapman eds. 1979).

139. A. WHITE, *supra* note 115, at 144.

140. *See id.*

141. *See, e.g.,* New York Times v. Sullivan, 376 U.S. 254, 275 (1964) (citing Madison, *The Report on The Virginia Resolutions,* in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 575 (1876)).

142. *See* V. HELD, *supra* note 121, at 192; Mackie, *supra* note 83, at 7-8.

143. V. HELD, *supra* note 121, at 192.

144 *See* Mackie, *supra* note 83, at 7-8.

> only such distribution of liberty of speech as that collective goal recommends in particular circumstances. His political position is exhausted by the collective goal; the putative right adds nothing and there is no point in recognizing it as a right at all.[145]

Thus, at a minimum, a right must generally defeat countervailing considerations of public inconvenience. Now, a defender of the free-speech balancing tests[146] can correctly point out that those tests may take free-speech rights seriously in the sense of disallowing restrictions on free speech and tolerating a mild degree of public inconvenience.[147] This assumption, however comforting, is contingent and uncertain. What prevents a court from reasonably concluding that the public convenience rises to the level of a significant or substantial interest? The balancing tests leave free speech rights too insecure.

The illegitimacy of most free speech balancing tests is particularly clear when one considers that freedom of speech is not merely any right, but a constitutional right of the highest status.[148] The "preferred position" of freedom of speech, as reflective of freedom of mind or conscience, is uncontested.[149] Just as infringement of the right to not be enslaved would not be allowed based on a contrary substantial public interest, the fundamental constitutional right of freedom of speech should generally not be held hostage to countervailing public interests.

A spirit of accommodation suggests, though, that perhaps free speech rights should be considered commensurable with, and subordinated to, a "compelling" state interest, at least in a case when the compelling state interest is greatly furthered by regulation on speech, and where the state interest could not be furthered if the speech regulation were at all less severe, that is, where the state regulation is the least burdensome alternative. Unfortunately, the Supreme Court has never provided a coherent definition for the phrase "compelling state interest."[150]

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145. R. DWORKIN, *supra* note 16, at 92. *See also* J. FEINBERG, *supra* note 116, at 79-83.

146. See *supra* notes 8-54 and accompanying text for a discussion of free-speech balancing tests.

147. Arguably, avoiding modest amounts of public inconvenience may not rise to the level of a significant, substantial, or compelling public interest. *See, e.g.,* Sable Communications v. FCC, 109 S. Ct. 2829 (1989) (although government has compelling interest in protecting minors, total ban on indecent dial-a-porn service is overbroad); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (total ban on promotional advertising by electric utilities overbroad even though state has substantial interest in energy conservation).

148. *See New York Times,* 376 U.S. at 275.

149. Wallace v. Jaffree, 472 U.S. 38, 50 n.35 (1985) (quoting Prince v. Massachusetts, 321 U.S. 158, 164 (1944)) (preferred position of constitutional rights reflecting freedom of thought and conscience).

150. *See* Eu v. San Francisco County Democratic Cent. Comm., 109 S. Ct. 1013, 1026

Several examples exist of what the Court has considered to be compelling state interests, formulated in epically broad, general terms.[151] Repeated use of the term "compelling," though, fails to show that the Court uses the term unequivocally and coherently.[152]

To their credit, Justices Blackmun and Stevens have separately written of their doubts about the meaning of compelling state interests.[153] Justice Stevens has written that if "compelling" means "so important that it overrides, on a constitutionally authorized common scale of values, the incompatible speech rights otherwise worthy of respect," then, he concluded, the compelling state interest test is not a test but rather an arbitrary pronouncement.[154] Some evidence exists that the term "compelling" is in fact used in just this utterly conclusory, question-begging way.[155]

Justice Stevens has offered two slightly divergent accounts of what "compelling" might mean in this context. A compelling interest might be one such that a statutory intent to foster that interest automatically constitutionalizes the statute.[156] This interpretation does not solve the obvious problem of whether any constitutionally legitimate interest can be commensurated with and perhaps override the free-speech right. On the other hand, Justice Stevens has concluded that if a compelling state interest merely calls for "thoughtful attention" to the relationship between the statute and the asserted interest, then virtually any legitimate state interest would qualify as "compelling," assuming that any and all commensurability problems are set aside.[157]

The problem of commensurating state interests and free-speech

(1989) (Stevens, J., concurring); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring).

151. *See supra* text accompanying notes 36-40.

152. *See supra* notes 36-40 and accompanying text.

153. *See San Francisco County Democratic Cent. Comm.*, 109 S. Ct. at 1026 (Stevens, J., concurring); *Socialist Workers Party*, 440 U.S. at 188-89 (Blackmun, J., concurring).

154. *San Francisco County Democratic Cent. Comm.*, 109 S. Ct. at 1026 (Stevens, J., concurring). Justice Stevens noted that if "compelling" means " 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all." *Id.* (quoting *Socialist Workers Party*, 440 U.S. at 188 (Blackmun, J., concurring)).

155. Note the judicial inclination to view "compelling" and "overriding" as essentially synonymous. *See* Galloway, *supra* note 13, at 465-66 (citations omitted). In the equal protection context, Justice O'Connor has suggested that the Court considers whether the legislative goal is "important enough to warrant" recourse to racial classifications. *See* City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 721 (1989). This approach would also render "compelling" an essentially conclusory pronouncement.

156. Caban v. Mohammed, 441 U.S. 380, 402 n.3 (1979) (Stevens, J., dissenting).

157. *Id.*

rights in a way authorized by the Constitution has not been solved, and the appropriate solution will reject anything remotely similar to the current free-speech balancing tests. At first glance, though, if free-speech rights cannot legitimately be commensurated with state interests under the Constitution, the only alternative may be a controversial free-speech absolutism, perhaps of a sort associated with Justice Hugo Black.[158]

More thorough examination, however, shows that absolutism is not the sole legitimate approach to free-speech law. As a matter of logic or practicality, to deny the commensurability on a constitutionally authorized common scale of state interests and free-speech rights is not a commitment to free-speech absolutism. Rather, a view of free-speech law rejecting familiar sorts of absolutism[159] as well as the common assumption of the commensurability of interests and free-speech rights[160] is warranted.

V. FREE SPEECH AS A NON-ABSOLUTE RIGHT NOT LEGITIMATELY SUBJECT TO BALANCING

Several factors make possible a free-speech right which is neither commensurable nor absolute. These factors include the nature of the Constitution, the text and purposes of the Free Speech Clause,[161] and the possibility of conflicts between free-speech rights themselves as well as with other enumerated constitutional rights. Under such a formulation, the limitations on the right of freedom of speech would arise not from any general interest balancing of a familiar sort, but from the limitations of the Constitution itself, from the idea of freedom of speech, and from the Free Speech Clause's role within the Constitution. These limitations provide four approaches under which a court may find that a restriction of speech is legitimate.

First, even a preferred or fundamental right, like freedom of

158. Justice Black felt that the free speech clause itself embodied whatever balancing the framers and ratifiers of the Constitution thought appropriate, and that literalism and absolutism should generally guide free-speech jurisprudence. For a more detailed statement of Justice Black's position, see Black, *The Bill of Rights,* 35 N.Y.U. L. REV. 865 (1960). *See also* Kalven, *Upon Rereading Mr. Justice Black on the First Amendment,* 14 UCLA L. REV. 428 (1967); Meiklejohn, *supra* note 7, at 245. For early inquiries into the relative merits of absolutism and balancing, see Frantz, *supra* note 19, at 1424; Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance,* 50 CALIF. L. REV. 821 (1962).

159. *See, e.g.,* Black, *supra* note 158, at 874.

160. *See supra* notes 3-54 and accompanying text.

161. *See* Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 878-86 (1963).

speech,[162] need not be absolute, in the sense of being limitless in scope or indefeasible under all circumstances.[163] There are several reasons for this. Under the Constitution, even the most austere and apparently exceptionless constitutional injunctions may not be controlling, or may be temporarily set aside in extreme instances.[164] The Constitution itself may have certain aims and presuppositions. Certain ends may have been in view in enacting and subscribing to, or otherwise recognizing the document. At a minimum, parties may not want to construe the Constitution, or the Free Speech Clause, so as to create a "suicide pact."[165] One might reasonably argue that "internal" to the first amendment is an implied exception for situations of immediate or otherwise inevitable societal destruction,[166] or more generally, some catastrophic moral horror,[167] that limit the scope of the right of freedom of speech.[168] The focus is not on weighing or balancing, but on an implicit exception that surfaces during extreme circumstances.[169] Limiting freedom of speech in this manner, guided by this internal exception,[170] would be an extremely narrow limitation on free speech as a right, rather than an interest to be balanced away.

Second, freedom of speech may be less than absolute, even without

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162. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 275 (1964) (free public discussion viewed as fundamental principle of American government).

163. *See* J. FEINBERG, *supra* note 116, at 80 (absolute as unlimited in scope); R. DWORKIN, *supra* note 16, at 92 (absolute as not defeasible).

164. Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964) (Constitution protects against invasions of individual rights, but is not suicide pact); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963) (fifth and sixth amendment rights not preserved for members of armed forces accused of crime); Dennis v. United States, 341 U.S. 494, 501-08 (1951) (discussion of permissible government responses to organized subversive conspiracies).

165. For judicial statements of the understandable disinclination to view the Constitution as a suicide pact, see, *e.g.*, Doe v. Casey, 796 F.2d 1508, 1533 (D.C. Cir. 1986) (Buckley, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part, and remanded sub nom.* Webster v. Doe, 486 U.S. 592 (1988); United States v. DeRobertis, 693 F.2d 642, 653 (7th Cir. 1982) (Coffey, J., dissenting in part) (citing Address by Chief Justice Burger, American Bar Ass'n Mid-Year Meeting (Feb. 8, 1981)).

166. *See* Aleinikoff, *supra* note 6, at 1000.

167. *See* J. THOMSON, *supra* note 130, at 56.

168. Emerson, *supra* note 161, at 931-37. This exception might be sufficiently narrow on its own terms to preclude regular judicial abuse, but it might be restated in more usefully concrete terms. For example, this exception may apply in cases in which the survival of the nation itself is jeopardized, or thousands of deaths are otherwise unavoidable, in the absence of the restriction.

169. Aleinikoff, *supra* note 6, at 1000 & n.317. One should not too readily assume that rights are absolute; rarely, if ever, will we be posed with a stark choice between societal preservation and the violation of a right. *But cf.* Frantz, *supra* note 19, at 1437 (assuming that right against self-incrimination cannot be set aside even for societal preservation).

170. *See* Aleinikoff, *supra* note 6, at 1000.

generalized interest balancing, if only government action which works a genuinely meaningful restriction on the freedom of speech of the complaining party is viewed as an abridgment of freedom of speech.[171] This approach is viable despite assertions that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[172] Some restrictions on the location of permitted speaking, for example, are simply insignificant from the speaker's own standpoint in light of the legitimate free-speech-related aims and purposes of the speaker.[173] Furthermore, some restrictions on the speech of a particular speaker are in practice only nominal. The restrictions may leave the speaker with alternative places to speak or ways of speaking, without significantly distorting the speaker's message, reducing the size or quality of the audience, or otherwise significantly impairing the overall value of the exercise of the right to speak.[174] Being asked by the government to move one's sidewalk literature table away from a fire hydrant may be best thought of not as a cognizable but justified burden on free-speech rights based on a mysterious hybrid rights-utility calculus, but as not abridging free-speech rights in any meaningful manner, given the circumstances.[175]

Third, even in the absence of general balancing, free-speech rights are not absolute because not only will one person's exercise of free-speech rights inevitably come into conflict with the free-speech rights of other persons,[176] but also because such exercise will eventually come into conflict with other equally preferred and fundamental constitutional

171. This idea is similar to what is used in analysis of other fundamental rights, such as privacy or travel, where the right only protects against governmental action that "impinges upon" or "unduly burdens" that right. *See, e.g.,* Whalen v. Roe, 429 U.S. 589, 600 (1977) (New York law requiring recording of persons' names and addresses who had received prescriptions of certain drugs did not "pose sufficiently grievous threat" to right to privacy to establish constitutional violation); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256 (1974) (although state's requirement "impinges to some extent on the right to travel," requirement was not unconstitutional).

172. Schneider v. State, 308 U.S. 147, 163 (1939) (restiction on speech in a labor context).

173. *Cf.* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 654-55 (1981) (recognizing that restrictions on fairgrounds solicitation left open other opportunities, both inside and outside fairgrounds). In particular contexts, soliciting outside a fairgrounds may allow the speaker to promote the speaker's own free-speech purposes or values as well, on balance, as soliciting on the fairgrounds.

174. For elaboration of the underrecognized importance of alternative speech channel analysis, see Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels,* 9 PACE L. REV. 57 (1989).

175. *Id.* at 83-84.

176. For example, the right of a passenger on a city bus to address the other passengers might conflict with the right of those passengers to engage in discussions of public issues among themselves.

rights.[177] In some cases, the courts may have literally no choice but to sacrifice certain rights, because conflicting rights appear on both sides of the case.[178] The courts may in fact have no coherent guide to resolving such conflicts. They may resort to a vague intuitionism in resolving such cases. But in such cases, with fundamental constitutional rights inevitably in conflict, no alternative may exist to using vague intuitionism.

Finally, free-speech rights are not absolute in the sense that not every activity need qualify as speech in the constitutional sense. In the area of free-speech law, the obvious purposes or values underlying the Free Speech Clause cannot be ignored in order to find all sorts of activities to be "speech."[179] Perhaps the clearest case of expanding the concept of speech beyond the limits suggested by the purposes of freedom of speech was the Supreme Court's determination that ordinary barroom commercial nude dancing fell into the category of speech in the constitutional sense.[180] If ordinary commercial nude dancing is to count as speech, it is hardly surprising that the courts have often been inclined to balance away free speech rights in favor of all sorts of legitimate public interests.[181] Unjustified expansion of what counts as speech only makes unjustified balancing of free speech rights seem that much more attractive.

For example, courts may not justify violation of constitutional rights by balancing away what they assume to be genuine rights of political speech against loss of efficiency in a governmental office.[182] If courts are to restrict government-employee speech, they must either adopt one of the four approaches discussed immediately above, or create some special

177. *See* Lehman v. Village of Shaker Heights, 418 U.S. 298, 303-04 (1974) (restriction on speech on public bus permissible partly due to "captive audience" problem).

178. For example, in *Nebraska Press Ass'n v. Stuart,* free-press rights conflicted with the right of a criminal defendant to a fair trial. 427 U.S. 539, 570 (1976). The Court observed in *Nebraska Press* that "the guarantees of freedom of expression are not an absolute prohibition under all circumstances . . . ." *Id.* Not all conflicts between constitutional rights stretch the limits of constitutionally principled adjudication, however. Certain constitutional rights, such as the eighth amendment repudiation of "excessive" bail, or the due process requirements of the fifth and fourteenth amendments by their very formulation invite the courts to consider a range of values and costs in deciding the case. *See supra* notes 96-98 and accompanying text.

179. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

180. *See id.* at 66. The purposes, values or interests thought to underlie the Free Speech Clause may include the search for truth, political participation, and self-realization, among others. *See, e.g.,* Emerson, *supra* note 161, at 879. For further discussion of the purposes or values underlying the Free Speech Clause as imposing certain limitations on what can reasonably count as speech, see R.G. WRIGHT, THE FUTURE OF FREE SPEECH LAW (to be published by Greenwood-Praeger 1990).

181. *See, e.g.,* Rankin v. McPherson, 483 U.S. 378, 384 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

182. *See Connick,* 461 U.S. at 142.

doctrine, such as a theory that a government employee contractually waives the right to speak publicly on office-related matters. Mere interest balancing will not suffice.

VI. CONCLUSION

A fair conclusion is that free-speech rights are not absolute, and that most of the current judicial balancing tests used to restrict freedom of speech[183] are either incoherent or not authorized by the Constitution. Constitutional balancing tests generally attempt to commensurate diverse interests.[184] Even if this were otherwise possible in a constitutionally authorized way, this process fails to take adequate account of the significance of a constitutional right, as opposed to a mere interest, however important the interest may seem. Commensurating the right of freedom of speech with opposing state interests in a manner respectful of the nature of the rights at issue is generally impossible. Fortunately, remaining options are not restricted to an "absolutist" theory of free speech rights, under which free-speech rights are taken as indefeasible, nontransferable, or limitless.

The objection might be raised that the concept of "interest" can be used as a common scale to measure the relative worth of both rights and interests that conflict in a given case. A judge might, for example, correctly arrive first at the "weight" of the interests that are in conflict with the constitutional right. The judge might then attempt to consider the extent to which the interests of the public, or of the right-holder, would be advanced in various ways if the right-holder were allowed to exercise the constitutional right at issue. But this approach would again reflect a misunderstanding of the nature of a right. Rights are not forfeited merely by imprudent use on a given occasion. Free speech rights are very special rights indeed.[185] As we have recognized, though, if an activity does not implicate the interests we seek to protect through free-speech rights, as in the case of ordinary commercial nude dancing,[186] we may not be dealing with constitutionally protected speech at all. However, once an activity is determined to be an exercise of a constitutional right or, more specifically, as an exercise of free-speech rights, it cannot lose its character as a right merely because its exercise on a particular occasion

183. *See supra* notes 8-54 and accompanying text.

184. *See* Aleinikoff, *supra* note 6, at 945, 973. For a recognition of the limits of sophisticated cost-benefit balancing of all sorts of public interests, see E. MISHAN, COST-BENEFIT ANALYSIS 160-61 (3d ed. 1982).

185. *See* New York Times v. Sullivan, 376 U.S. 254, 275 (1964).

186. *See supra* notes 180-81 and accompanying text.

might, all things considered, be thought to be contrary to the public interest.[187]

Generalized balancing in free speech cases has been thought to offer increased rationality in adjudication.[188] It is fair to conclude, however, that this objective has not been achieved.[189] Instead, as Professor MacIntyre has suggested, the "facts of incommensurability"[190] condemn attempts to treat asserted rights and conflicting interests evenhandedly, as on a common scale authorized by the Constitution, to failure.[191]

If an activity is said to involve the exercise of the constitutional right to free speech, it should be limited in only four situations. First, the constitutional right can legitimately be limited in cases of looming moral catastrophe.[192] Second, the right can be limited where it is not meaningfully impaired.[193] Third, the right can be limited where it necessarily conflicts with equally inviolable rights.[194] Finally, a claim to a constitutional right can be rejected where the activity at issue does not fall within the scope of the right, as determined by the constitutional text, the purposes or values underlying the right, or other legitimate means of constitutional interpretation.[195] These four limitations on the freedom of speech would concurrently allow restoration of freedom of speech to its proper status as a fundamental constitutional right without its becoming an absolute right.

A right such as freedom of speech, by definition, cannot generally be balanced against an ordinary interest. Free speech balancing tests are ultimately incoherent or, at best not justified by the Constitution nor the role of free speech within the Constitution. Free speech balancing tests should, therefore, be abandoned.

187. *See supra* notes 139-45 and accompanying text.
188. *See* Mendelson, *supra* note 158, at 825.
189. *See supra* notes 66-69 and accompanying text
190. *See* A. MACINTYRE, *supra* note 86, at 71.
191. *Id.*
192. *See supra* notes 162-70 and accompanying text.
193. *See supra* notes 171-75 and accompanying text.
194. *See supra* notes 176-78 and accompanying text.
195. *See supra* notes 179-82 and accompanying text.